

THOMAS HEINRICH
Claimant

N. R. HAMM QUARRY
Respondent

CNA INSURANCE COMPANY
Insurance Carrier

)
)
)
)
)
)
)
)
)

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

Respondent disputes the ALJ's finding that claimant has proven a 42 percent permanent partial disability resulting from his June 17, 1998 work-related accident. Respondent argues claimant's disability benefits should be limited to the functional impairment rating because claimant did not make a good faith effort to return to the accommodated, comparable wage job respondent offered to claimant after the injury.

Claimant asks that the ALJ's Award be affirmed unless the Board finds claimant is permanently and totally unable to engage in any substantial, gainful employment. In that case, claimant asks for a permanent total disability award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified. Claimant is awarded benefits for a 5 percent permanent partial disability based on functional impairment.

Findings of Fact

1. Claimant was injured on June 17, 1998, when his head and neck became pinned by rollers underneath a conveyor belt causing him to be choked and to lose consciousness. Claimant does not know how he got free, but woke up on the ground.
2. Following his release to return to work with restrictions, respondent offered claimant a job as a flagman, doing traffic control for a road construction crew. This job involves holding a sign, turning it 180° and periodically operating a pilot car. Respondent offered to further accommodate claimant by limiting this pilot car driving duty, if necessary.
3. Claimant had attempted to perform the flagman job while under temporary light duty restrictions but, due to headaches and nausea, had been unable to do that job for a full 8-hour work day. After receiving permanent restrictions and a release from the treating physician, claimant declined to attempt the flagman job. His supervisor made claimant an open-ended offer to put him to work at any time in the future that claimant felt he was capable of working.
4. Peter V. Bieri, M.D., testified that claimant was capable of performing the job duties of flagman.
5. Sharon McKinney, D.O., testified that claimant could perform the job tasks of a flagman, which were described to her as a road crew laborer doing traffic control, "if he had appropriate rest and could change his positions when he's holding the sign"
6. Dick Geis, M.D., testified that claimant could perform the job as a flagman.
7. Dr. Geis admitted that claimant may have a mental obstacle to working, but any mental or psychological disability claimant had was unrelated to the work-related accident.
8. Claimant presented no expert medical or psychological opinion testimony that claimant did in fact have a mental impairment or psychological condition. Furthermore, there is no credible evidence that any such psychological disability was caused by claimant's injury at work.

Conclusions of Law

1. Claimant has the burden of proving his right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts of obtaining or retaining employment after the injury. Claimant may not refuse to accept a reasonable offer for accommodated work. If the claimant refuses to attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). *See also*, Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. The Board concludes that claimant is able to engage in substantial, gainful employment. The testimony by claimant to the contrary is acknowledged but from the record as a whole the Board concludes claimant is not totally disabled. Under the work restriction opinions of all of the medical experts claimant would be capable of performing the flagman job.

5. The Board finds claimant did not make a good faith effort to attempt the flagman job when it was first offered by respondent and has made no effort to attempt that job in the period of time that has elapsed since. The record reflects that claimant made no other attempts to find employment.

6. Because claimant did not make a good faith effort to perform the accommodated job with respondent, the Board imputes that wage. The imputed wage is more than 90 percent of the stipulated average weekly wage and claimant is, therefore, limited to an award based on a functional impairment. K.S.A. 44-510e.

7. Based on the testimony of Dr. Bieri, the Board finds claimant has a functional impairment of 5 percent to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery dated October 27, 1999, should be, and the same is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Thomas Heinrich, and against the respondent, N. R. Hamm Quarry, and its insurance carrier, CNA Insurance Company, for an accidental injury which occurred June 17, 1998, and based upon an average weekly wage of \$451.00 for 9.51 weeks of temporary total disability compensation at the rate of \$300.68 per week or \$2,859.47, followed by 20.75 weeks at the rate of \$300.68 per week or \$6,239.11, for a 5% permanent partial general disability, making a total award of \$9,098.58, which is ordered paid in one lump sum minus amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
John David Jurcyk, Lenexa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director